

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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MARQUES PHILLIPS and CYNTHIA  
PHILLIPS,

Plaintiffs,

v.

NO. CIV. S-04-0377 FCD PAN

MEMORANDUM AND ORDER

CITY OF FAIRFIELD, CHIEF OF  
POLICE WILLIAM GRESHAM,  
OFFICER MARK SCHRAER, OFFICER  
CHAD TIGERT, OFFICER STEVE  
TROJANOWSKI, JR., OFFICER MIKE  
BEATTY, OFFICER MATTHEW  
THOMAS, OFFICER STEPHEN RUIZ,  
OFFICER TROY OVIATT, OFFICER  
JEREMY NIPPER, OFFICER FRANCO  
CESAR, OFFICER CADE BECKWITH,  
and DOES 1 through 13,

Defendants.

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This matter is before the court on plaintiff Marques  
Phillips' ("Phillips") motion for reconsideration of the court's  
December 21, 2005, order granting defendant Chief William  
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1 Gresham's ("Gresham") summary judgment. For the reasons set  
2 forth below, plaintiff's motion is DENIED.

3 **BACKGROUND**

4 On October 18, 2005, defendants filed a consolidated motion  
5 for summary judgment. In his opposition to defendant Gresham's  
6 motion for summary judgment, Phillips contended that Gresham was  
7 liable under § 1983 in his individual capacity for both his  
8 actions and inaction. Specifically, plaintiff argued that  
9 Gresham failed to train defendant officers, failed to supervise  
10 defendant Trojanowski, and failed to discipline defendant  
11 Trojanowski for citizen complaints of excessive force. In  
12 support of his claims, plaintiff produced evidence that  
13 Trojanowski had six citizen complaints against him for excessive  
14 force. However, the evidence also demonstrated that Trojanowski  
15 was investigated and exonerated for each claim and that  
16 plaintiff's civilian complaint was investigated and the officers  
17 involved were exonerated. Plaintiff contended that the  
18 investigation into their complaint was "less than cursory."

19 Based upon this showing, the court found that plaintiff did  
20 not raise a triable issue of individual liability as to defendant  
21 Gresham. The court specifically noted (1) that plaintiff did not  
22 present any expert testimony that Gresham created or maintained a  
23 policy whereby civilian complaints of excessive force are  
24 meaningless; (2) that plaintiff did not present any evidence that  
25 the investigations into the prior civilian complaints against  
26 Trojanowski or the investigations into their own complaint  
27 against the officers was cursory, inadequate, or meaningless; and  
28 (3) that plaintiffs did not present evidence that Gresham

1 condoned the use of excessive force. Thus, on December 21, 2005,  
2 the court granted Gresham's motion for summary judgment.  
3 However, defendants' motion for summary judgment was granted in  
4 part and denied in part.

5 On December 30, 2005, plaintiff filed a motion for  
6 reconsideration of the court's order granting defendant Gresham's  
7 motion for summary judgment. Plaintiff asserts that there is new  
8 evidence that the Fairfield Police Departments Internal  
9 Investigation into plaintiff's claim was partial to the officers  
10 and incomplete, that Gresham knew or should have known that the  
11 Investigation was partial and incomplete, and that, in spite of  
12 this information, Gresham absolved the involved officers of all  
13 wrongdoing. Defendants oppose the motion. Defendants also give  
14 notice that they intend to seek Rule 11 sanctions if plaintiff  
15 does not withdraw his motion.

16 **STANDARD**

17 An order that resolves fewer than all of the claims among  
18 all of the parties "is subject to revision at any time before the  
19 entry of judgment adjudicating all the claims and the rights and  
20 liabilities of all the parties."<sup>1</sup> Fed. R. Civ. P. 54(b); 18B  
21 Charles Alan Wright & Arthur R. Miller, Federal Practice &  
22 Procedure § 4478 (2d Ed. 2005) (while authorized, reconsideration  
23 of interlocutory orders disfavored). Where reconsideration of a  
24 non-final order is sought, the court has "inherent jurisdiction  
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26 <sup>1</sup> Although the court's grant of summary judgment resolved  
27 all claims against defendant Gresham, it is not an appealable  
28 final order. Fed. R. Civ. P. 54(a) ("Judgment' as used in these  
rules, includes any decrees or order from which an appeal  
lies.").

1 to modify, alter or revoke it." United States v. Martin, 226  
2 F.3d 1042, 1048-49. (9th Cir. 2000)

3 Absent "highly unusual circumstances," reconsideration of a  
4 final judgment is appropriate only where (1) the court is  
5 presented with newly-discovered evidence, (2) the court committed  
6 "clear error or the initial decision was manifestly unjust," or  
7 (3) there is an intervening change in the controlling law.<sup>2</sup>

8 School Dist. No. 1J, Multnomah County, Or. v. AcandS Inc., 5 F.3d  
9 at 1263; Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2004).

10 A motion for reconsideration "may not be used to raise arguments  
11 or present evidence for the first time when they could reasonably  
12 have been raised earlier in the litigation." Kona Enter., Inc.

13 v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). The  
14 party moving for reconsideration based on allegations of newly-  
15 discovered evidence bears the burden of demonstrating that the  
16 evidence: "(1) is truly newly-discovered; (2) could not have been  
17 discovered through due diligence; and (3) is of such material and  
18 controlling nature that it demands a probable change in the  
19 outcome." United States v. Wetlands Water District, 134 F. Supp.  
20 2d 1111, 1131 n.45 (E.D. Cal. 2001) (internal citations omitted).

## 21 ANALYSIS

22 Plaintiff argues that the court should reconsider the  
23 December 21, 2005 order granting defendant Gresham's motion for  
24 summary judgment on the grounds of newly-discovered evidence that

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26 <sup>2</sup> While the standards applicable to motions for  
27 reconsideration of final judgments or orders under Rules  
28 59(e) (final judgments) and 60(b) (final judgments and orders)  
technically do not delimit the court's inherent discretion to  
reconsider interlocutory orders, the court nonetheless finds them  
to be helpful guides to the exercise its discretion.

1 would preclude such a ruling. Plaintiff's new evidence is a  
2 declaration from his expert witness, Tommie E. Phillips, Sr.,  
3 that the Fairfield Police Departments Internal Investigation into  
4 plaintiff's claim was partial to the officers and incomplete,  
5 that Gresham knew or should have known that the Investigation was  
6 partial and incomplete, and that, in spite of this information,  
7 Gresham absolved the involved officers of all wrongdoing. (Decl.  
8 of Mister Phillips' in Supp. of Pl.'s Mot. for Recons. ("M.  
9 Phillips Decl."), filed Dec. 30, 2005). Plaintiff asserts that  
10 this evidence was not presented at the time of defendants'  
11 summary judgment motion because it was to be part of a larger  
12 study of Fairfield Police Department Internal Affairs  
13 Investigations which was not complete at the time of the motion  
14 because defendants did not produce the necessary Internal Affairs  
15 Investigation files until the week that plaintiff's opposition  
16 papers were due. (Id.)

17 To the extent that plaintiff has presented an expert  
18 declaration in support of his claims against defendant Gresham,  
19 this evidence is "new"; plaintiff did not present such a  
20 declaration in opposition to defendants' motion for summary  
21 judgment. However, this declaration is based upon facts known to  
22 plaintiff at the time of the summary judgment motion, some of  
23 which were actually referenced and argued in plaintiff's  
24 opposition to the motion. To this extent, plaintiff's expert  
25 declaration is not truly newly-discovered.

26 Plaintiff's expert bases his conclusions, in part, upon the  
27 memoranda from Chief Gresham approving the Report and  
28 Recommendations which exonerated the defendant officers.

1 (Declaration of Expert Witness Tommie E. Phillips in Supp. of  
2 Pl.'s Mot. for Recons. ("T. Phillips Decl."), filed Dec. 30,  
3 2005, at 4). These same memoranda were submitted as evidence in  
4 plaintiff's opposition to defendants' summary judgment motion.  
5 (Exh. D to Pl.'s Stmt. of Undisputed Facts in Opp'n to Def.'s  
6 Mot. for Summ. J., filed Nov. 4, 2005). Plaintiff's expert also  
7 bases his conclusions on the Fairfield Police Department's  
8 Internal Affairs Report. (T. Phillips Decl. at 2). Plaintiff  
9 and plaintiff's expert had possession of this document prior to  
10 September 8, 2005; plaintiff's expert reviewed and discussed it  
11 in his supplemental expert witness statement. (Declaration of  
12 Jennifer C. Addams in Supp. of Def.'s Opp'n to Pl.'s Mot. for  
13 Recons. ("Addams Decl."), filed Jan 24, 2006, Exhs. C-D.  
14 Plaintiff's expert testified about the Internal Affairs Report at  
15 his deposition on September 21, 2005.<sup>3</sup> (Id. at Exhs. E-F).  
16 Finally, plaintiff's expert relies upon Recommendations by  
17 Captain Giugni. (T. Phillips Decl. At 2). While it is unclear  
18 when plaintiff had access to this particular document, this  
19 evidence is not "truly new" because defendant Gresham followed  
20 these same Recommendations in absolving the officers. (T.  
21 Phillips Decl. at 4). Plaintiff submitted Gresham's Memoranda  
22 accepting the Recommendations to the court with his opposition to  
23 the motion for summary judgment.

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25 <sup>3</sup> Plaintiff objects to the court's consideration of this  
26 evidence because plaintiff was not given an opportunity to cross-  
27 examine the witness at the deposition. However, the court is not  
28 considering this evidence for its truth. Rather, the deposition  
testimony demonstrates that plaintiff had access to the expert  
and the expert's opinions regarding defendant Gresham's potential  
liability well before the opposition to defendants' summary  
judgment motion was due.

1 Plaintiff fails to meet his burden of demonstrating that  
2 this evidence could not have been presented in opposition to  
3 defendants' motion with the exercise of due diligence. Plaintiff  
4 possessed expert statements and deposition testimony from Tommie  
5 E. Phillips prior to defendants' filing of the motion for summary  
6 judgment. These statements and deposition testimony referenced  
7 and discussed the Internal Affairs Reports and the adequacy of  
8 the investigation. However, none of these materials was  
9 submitted to the court by plaintiff. Plaintiff presented no  
10 evidence at all relating to or prepared by any expert. Further,  
11 plaintiff proffers no reason why the expert could not have  
12 prepared the declaration submitted with the current motion as  
13 evidence in opposition to defendants' motion for summary  
14 judgment.

15 Plaintiff states that defendants did not produce the  
16 necessary Internal Affairs Investigation files until the week the  
17 opposition papers were due. (M. Phillips Decl. at 2).  
18 Defendants produce evidence that the police officers' records  
19 were available to plaintiff to copy on October 11, 2005.  
20 (Declaration of Kimberly E. Colwell in Supp. of Def.'s Opp'n to  
21 Pl.'s Mot. for Recons. ("Colwell Decl."), filed Jan 24, 2006, ¶  
22 4). Defendants also produce evidence that copies were available  
23 for the plaintiff to pick up on October 19, 2005. However, due  
24 to conflicts between the attorneys regarding copying  
25 arrangements, payment, and receipt of the documents, plaintiff's  
26 attorney did not actually pick up the documents until November 1,  
27 2005. (Id. ¶¶ 14-19). The evidence presented by defendants  
28 demonstrates a lack of diligence by plaintiff in obtaining the

1 records.

2 Plaintiff argues that no declaration was submitted because  
3 the expert's larger study regarding the adequacy of the Fairfield  
4 Police Department's citizen complaint process was not completed.  
5 (Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. for Recons., filed Feb  
6 4, 2006, at 4-5). However, this argument does not explain why  
7 plaintiff did not submit a declaration by his expert regarding  
8 the adequacy of the investigation into plaintiff's complaint. It  
9 is unclear how the police records were integral and necessary to  
10 the opinions proffered by plaintiff's expert in his declaration.  
11 The expert never mentions the police officers' records in his  
12 declaration. Further, the expert declaration does not address a  
13 larger study. (T. Phillips Decl.) Rather, Tommie E. Phillips'  
14 declaration focuses on the inadequacies of Sergeant Grace's  
15 investigation into plaintiff's complaint and in preparing the  
16 Internal Affairs Report. These inadequacies were previously  
17 discussed by the expert in his September 21, 2005 deposition.

18 Plaintiff failed to present expert deposition testimony or  
19 declarations as evidence in his opposition to defendant Gresham's  
20 motion for summary judgment. Plaintiff had access to the expert,  
21 the documents relied upon by the expert, and conclusions made by  
22 the expert that implicated the potential liability of defendant  
23 Gresham. For whatever reason, plaintiff did not present this  
24 evidence in opposition to defendants' motion for summary  
25 judgment. Plaintiff cannot now, after failing to raise a triable  
26 issue of fact as to defendant Gresham's liability, attempt to  
27 reclassify this previously known evidence as "newly-discovered"  
28 evidence for the purposes of reconsideration merely by preparing



1 an expert declaration.

2 **CONCLUSION**

3 Based on the foregoing analysis, plaintiff's motion for  
4 reconsideration of the court's December 21, 2005 order granting  
5 summary judgment for all claims against defendant Chief William  
6 Gresham is DENIED.

7 IT IS SO ORDERED.

8 DATED: February 10, 2006

9 /s/ Frank C. Damrell Jr.

10 FRANK C. DAMRELL, Jr.  
11 UNITED STATES DISTRICT JUDGE  
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